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Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, DC 20554

JAN 10 2003

FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

In the Matter of)	
)	
Amendment of Section 73.202(b))	MM Docket No. 01-65
Table of Allotments,)	RM-10078
FM Broadcast Stations.)	RM-10188
(Emmetsburg, Sanborn, and Sibley, Iowa)	RM-10189
and Brandon, South Dakota)	

To: Assistant Chief, Audio Division
 Media Bureau

OPPOSITION TO PETITION FOR RECONSIDERATION

1. Eisert Enterprises, Inc. ("Eisert"), licensee of KDWD(FM), Emmetsburg, Iowa, by its attorneys and pursuant to Section 1.429(f) of the Commission's rules, hereby opposes the Petition for Reconsideration (the "Petition") of the order' in the above-referenced rule making proceeding filed by Saga Communications of Iowa, LLC ("Saga") on November 18, 2002.' As demonstrated below, Saga's Petition must be dismissed or denied because (i) Saga bases its right to file the Petition on what it claims to be newly available information, *i.e.*, 2000 Census data, that actually was available to it during the rule making proceeding; (ii) Saga claims that Eisert's proposal would result in an increase in service to only "24,939 persons" – a claim that directly contradicts the

¹ *Emmetsburg, Sanborn and Sibley, Iowa and Brandon, South Dakota, Report and Order*, MM Docket No. 01-65, RM-10078, RM-10188, RM-10189, DA 02-2389, released September 27, 2002 (the "Report and Order").

² Although the Commission has not yet released a public notice announcing Saga's Petition, meaning that Eisert's opposition thereto is not yet due (**see** 47 C.F.R. § 1.429(f)), Eisert is filing its opposition now in order to quickly resolve this matter and remove any cloud over its application to upgrade KDWD (*see* BPH-20021113AAS), so that it can construct the upgraded facilities and begin providing additional service to thousands of people as quickly as possible.

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FCC's finding that Eisert's proposal "would result in a net gain of service to 29,029 people;" and (iii) the Petition is nothing more than an attempt to thwart competition by preventing the upgrade of KDWD – a station that has been in operation for the past 26 years – by seeking the upgrade of a *vacant* channel to which Saga has no right or ability to utilize for a new station.

2. Saga's Petition Is Fatally Flawed. Section 1.429(b) of the Commission's rules states, *inter alia*, that a petition for reconsideration which relies on facts which have not been previously presented to the Commission will be granted only if

(1) The facts relied on relate to events which have occurred or circumstances which have changed *since the last opportunity to present them to the Commission*; [or] (2) The facts relied on were unknown to petitioner until after his last opportunity to present them to the Commission, and he could not through the exercise of ordinary diligence have learned of the facts in question prior to such opportunity.³

3. Saga states that it has a right to file its Petition under Section 1.429(b) because "the 2000 census data for the communities involved was not available at the time the counterproposals were filed in this proceeding, April 23, 2001."⁴ Saga's claim is meaningless.

4. Although the 2000 Census data was not available when Saga and Eisert filed their counterproposals on April 23, 2001, the data *was available* when Saga and Eisert filed their initial replies in this proceeding on May 8, 2001 and their subsequent replies on August 8, 2001. In fact, Eisert specifically stated in its Reply to Counterproposal that it was "using now-available 2000 U.S. Census data" when it conclusively demonstrated that its proposal to upgrade KDWD to a Class C3 station would provide new service to more people than Saga's proposal to upgrade a

³ 47 C.F.R. § 1.429(b)(1)-(2) (emphasis added).

⁴ Petition, page 2.

vacant channel at Brandon, South Dakota.’ Given the fact that the 2000 Census data was available to Saga “since the last opportunity [Saga had] to present them to the Commission,”⁶ Saga’s Petition fails to meet the prerequisites of filing a petition for reconsideration under Section 1.429. Saga’s Petition, therefore, must be dismissed.’

5. Saga’s Revised Data Directly Contradicts the Commission’s Findings. In the Report and Order, the Commission, *inter alia*, denied Saga’s proposal to upgrade vacant Channel 261A at Brandon, South Dakota, and granted Eisert’s proposal to upgrade KDWD in Emmetsburg from a Class A to a Class C3 station.’ After conducting its own engineering and population analyses to determine which proposal could provide additional service to the greatest number of people, the Commission determined that Eisert’s proposal “would result in a net gain of service to 29,029 people whereas [Saga’s] proposal would result in service to an additional 24,614 people.”’ As the

⁵ See Reply to Counterproposal, filed by Eisert Enterprises, Inc. on May 8, 2001, in the above-referenced proceeding.

⁶ See 47 C.F.R. § 1.429(b)(1).

⁷ Even if Saga’s claim that the 2000 Census data was not available were true, its Petition would still not be worthy of consideration since it runs contrary to the well-settled principle that the finality of administrative decisions serves the public interest. The Commission has ruled that it “cannot allow the appellant to sit back and hope that a decision will be in its favor, and then, when it isn’t, to parry with an offer of more evidence.” *Foult and Biselli*, 3 FCC Rcd 5631 (1988). The Commission also has held that its “processes require that we consider all evidence at one time and not in a piecemeal fashion. These processes operate inefficiently when.. evidence is presented piecemeal. The Commission’s rules are intended to promote orderly adjudicative processes and administrative finality.” *San Francisco IVDS, Inc.*, 16 FCC Rcd 18008 (2001) (citations omitted).

⁸ See Report and Order, pages 2-3.

⁹ See Report and Order, page 2. As Eisert stated in its Reply to Counterproposal, upgrading the vacant channel at Brandon from a Class A to a Class C3 would only *theoretically* provide new service to additional persons, since the Commission has not issued a construction

Commission stated in the Report and Order, “[u]nder **our** precedent, mutually exclusive upgrade proposals are generally compared under priority (4) on the net gain of population.”” As Eisert noted in its Reply to Counterproposal, the Commission has determined that the difference in the number of people who would receive new service under conflicting proposals is “determinative.”” Given the fact that Saga has offered no evidence whatsoever that the Commission’s own engineering and population analyses which show that Eisert’s proposal is superior to Saga’s

permit for the channel – or even scheduled the channel for auction – while upgrading KDWD would *definitely* result in new service for approximately 29,000 people. *See* Reply to Counterproposal, page 3. In fact, Eisert filed **an** application to upgrade KDWD as soon as it was allowed to do so under the Report and Order, *see* BPH-20021113AAS, and Eisert will construct the upgraded facilities as soon as the Commission grants the application. Since the Commission likely will consider Saga’s Petition and the “Formal Objection” Saga filed against the KDWD upgrade application before granting the application, Saga has met at least one of its goals: thwarting new competition, at least temporarily, by delaying the ability of Eisert to upgrade KDWD. Saga is the licensee of six broadcast radio stations in Iowa, some of which compete directly with KDWD. *See* Reply to Counterproposal, page 1, note 1.

¹⁰ *See* Report and Order, page 2 (citing *Greenup, KY and Athens, OH*, 6 FCC Rcd 1493, 1495 (1991)). Saga claims that the “Audio Division ignored” the case it cited to support the notion that new service to a larger number of people, as opposed to net gain in the number of persons who would receive new service, should be the decisive factor. *See* Petition, page 5. Although the Commission did not specifically cite the case, it clearly considered Saga’s argument when it recited Saga’s claim that Eisert’s proposal would result in service to 76,542 people while Saga’s proposal would result in service to 175,923 people. *See* Report and Order, page 2. However, the Commission determined that net gain of people receiving new service is **of** a greater public interest than the overall number of people who would receive service, both existing and new service. *See id.*

¹¹ *See* Reply to Counterproposal, pages 3-4 (citing *Benton and Dardanelle, LA*, 3 FCC Rcd 4840, 4842 (1998) (citing *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982)); *Galesburg, IL and Ottumwa, IA*, MM Docket No. 97-130, DA 00-2423, released October 27, 2000 (stating that under priority 4, the Commission will favor the proposal that would expand service to the greatest number of persons)).

proposal are flawed and that its own analysis is correct, the Commission should not consider Saga's analysis and dismiss or deny the Petition.

6. Saga May Not Seek an Upgrade of a Vacant Channel. Saga's Petition ignores the critical fact that it may not seek an upgrade of a vacate channel. As Eisert has already demonstrated in this proceeding, Section 1.420(g) of the Commission's rules provides for the upgrade of a construction permit or license during a rule making proceeding to amend the FM Table of Allotments. The Commission has held that only permittees and licensees may take advantage of this section to upgrade a channel. *See, e.g., Arlington, Texas and Durant, Oklahoma*, 8 FCC Rcd 4281, 4282 (1993) (noting that the Commission will not entertain a proposal for an upgrade of a channel in an allotment proceeding from a pending applicant who was neither a permittee nor a licensee); *Lafayette, Louisiana*, 4 FCC Rcd 5073 (1989) (refusing to consider channel upgrade requests while applications are pending); and *Santa Margarita and Guadalupe, California*, 2 FCC Rcd 6930 (1987), *review denied*, 7 FCC Rcd 4552 (1992).

7. In *Santa Margarita and Guadalupe, California*, Armando Garcia ("Garcia") was an applicant for Channel 288A at Guadalupe, California. When the Commission initiated a rule making proceeding to substitute Channel 291B1 for Channel 292A at Santa Margarita, California, Garcia filed a counterproposal, asking that the Commission instead substitute Channel 288A for Channel 290B1 at Guadalupe. In rejecting Garcia's counterproposal, the Commission first noted that Section 1.420 applies only to permittees and licensees – not applicants, such as Garcia. *Id.* page 6931, Furthermore, the Commission stated that its "*modification authority is expressly limited* [by Section 316 of the Communications Act of 1934, as amended] *to station licenses and construction permits.*" *Id.* (emphasis added).

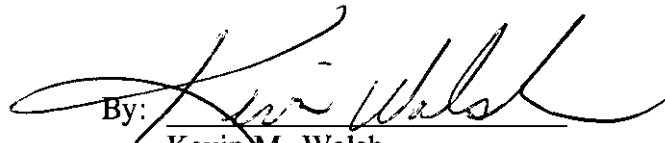
8. If an applicant, such as Garcia, who has an obvious interest in upgrading its applied-for channel is barred from requesting and obtaining the upgrade because of its status as a mere applicant, a non-applicant, such as Saga, who is once-removed from an applicant status should have even less authority to request and obtain the upgrade of a vacant channel. This is especially true when the upgrade of the vacant channel would foreclose the upgrade of a licensed station to provide new service to tens-of-thousands of persons. Under this precedent, Saga's proposal is unacceptable, and Saga's Petition, therefore, should be dismissed or denied.

9. Conclusion. Saga's Petition must be dismissed because it fails to offer any new evidence which was not available to it during the above-referenced rule making proceeding - a prerequisite to filing a petition for reconsideration under Section 1.429(b) of the Commission's rules. Saga's Petition should be dismissed or denied because Saga's claim that its proposal would provide new service to more people than would Eisert's proposal directly contradicts the Commission's findings in the Report and Order and the population data that Eisert filed in the rule making proceeding; yet Saga fails to offer any evidence that its data is correct. And finally, Saga's Petition should be dismissed or denied because it cannot seek the upgrade of a vacant channel in which it has no interest whatsoever, especially when the upgrade of the vacant channel would result in the denial of new services to tens of thousands of people by a station that has been operating for 26 years.

10. WHEREFORE, the premises considered, Eisert respectfully requests that the Commission dismiss or deny Saga's Petition.

Respectfully submitted,

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By: 
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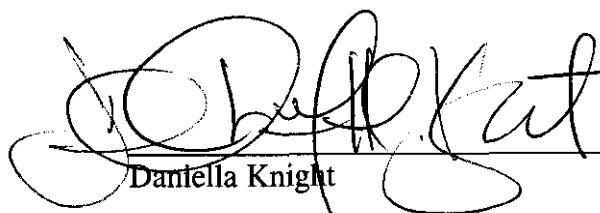
CERTIFICATE OF SERVICE

I, Daniella Knight, do hereby certify that I have, this 10th day of January, 2003, caused to be sent by first class United States mail, postage prepaid, or by hand delivery, a copy of the forgoing "Opposition to Petition for Reconsideration" to the following:

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